Legal Dept 22.10.96

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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO: 389/92

BETWEEN :

(1) INTERNATIONAL CREDIT AND INVESTMENT COMPANY (OVERSEAS) LIMITED (In Liquidation)

(2) FINANCE AND INVESTMENT INTERNATIONAL LIMITED

PLAINTIFFS

AND:

(1) SHAIKH KAMAL ADHAM

(2) FAISAL SAUD AL FULAIJ

(3) GHAITH RASHAD PHARAON

(4) PHARAOH HOLDINGS LIMITED

(5) LHASA INVESTMENTS LIMITED

(7) CONCORDE INTERNATIONAL TRADING S.A.

DEFENDANTS

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APPEARANCES: . L. Cohen, Q.C. and H. Moses for the Plaintiffs.

E. Sibley and M. Garcia for the Fifth Defendant

October 3, 1996

BEFORE MURPHY J.

REASONS FOR DECISION

This is an assessment of damages under Order 37. It arises as a result of the Judgment of Schofield J. dated June 1, 1995 which provided for the assessment of damages under several heads.

This matter first came before me by Notice of Appointment under Order 37 on August 9, 1996. On that day I assessed damages under one head in circumstances in which there was no opposition by any defendant. In fact, it has become apparent that only the Fifth Defendant takes any position at all with respect to the assessment.

The second head of damages was expressed as follows in the Notice of Appointment returnable August 9, 1996:

> "That judgment be entered jointly and severally against the 3rd, 4th, 5th, and 7th defendants, pursuant to Paragraph 12.4 of the Re-Amended Statement of Claim and pursuant to Conclusion No. 26 in the Judgment of Schofield J. herein, in the sum of U.S.$2,162,231 plus interest being the Plaintiffs' costs and expenses of investigating the conspiracies herein."

On August 9, 1996 counsel for the Fifth Defendant appeared and asked for time to file evidence relating to this second head. Counsel for the Fifth Defendant told me (on instructions which he said he had received from English solicitors) that the Fifth Defendant wished to adduce evidence in a number of areas. This application for an adjournment was resisted by counsel for the Plaintiffs, but I granted the Fifth Defendant time (until August 30, 1996) to put in evidence, and the assessment was adjourned to October 3, 1996, the day it was in fact heard. The Fifth Defendant never did file evidence for use on this assessment. I note as well at this juncture that, in the interim, the Fifth Defendant has neither made application for discovery nor sought to subpoena any witness in connection with the Plaintiffs' damage claim.

JUDGMENT OF SCHOFIELD J.

I do not intend to embark upon an exhaustive summary of the extensive reasons of Schofield J. Reference should be made to his reasons themselves for the full background. Suffice it to say that in this action Schofield J. found that the Third, Fourth, Fifth, and Seventh Defendants had been guilty of dishonest participation in two separate conspiracies. The Third, Fourth, and Fifth Defendants participated in the first conspiracy to defraud the Plaintiff International Credit and Investment Company (Overseas) Limited (hereinafter "ICIC") by falsifying its accounting records.. The Third, Fifth, and Seventh Defendants also participated in the second of those conspiracies, namely a conspiracy attempting to render assets judgment proof or to put them beyond the reach of the Plaintiffs, which conspiracy involved the transfer of shares of Attock Oil Company Ltd from Finance and Investment International Limited . Schofield J. found that the Plaintiffs were entitled to damages to be assessed under several heads including "the costs and expenses of investigating the conspiracy or conspiracies".

This action is but one aspect of the massive BCCI - related liquidation whose tentacles extend into the Cayman Islands as well as into other countries.

On July 22, 1991 this Court appointed partners of Deloitte & Touche (Cayman Islands) provisional liquidators of ICIC. The provisional liquidators were granted various powers (such powers to be executed within or outside the Cayman Islands) including power to collect and get in all property or assets to which ICIC was entitled, power to protect such assets, power to do all things necessary for the beneficial realisation of the property or assets of ICIC and power to bring or defend any legal proceedings necessary to protect the assets of ICIC. On April 29, 1992 this Court made an Order that ICIC be wound up. On that day, this Court also appointed partners of the same firm of accountants joint official liquidators of ICIC. As a result, personnel from that accounting firm (hereinafter "the accountants") have been extensively involved in a massive investigation to uncover the assets of ICIC. This action is but a part of that huge undertaking , and it is the costs of the accountants in connection with the investigation and litigation culminating in the judgment of Schofield J. that the Plaintiffs now seek to assess.

PLAINTIFFS' EVIDENCE ON THE ASSESSMENT OF DAMAGES

At the outset of the argument it appeared that counsel for the Fifth Defendant was seeking a ruling on two preliminary issues: first, whether evidence that was "speculative", or purely in the nature of estimation , could be relied upon at all; and, second, if it could, whether the only damages available as a result would be nominal damages. Counsel for the Plaintiffs seemed to endorse this approach , but took the view that if I ruled adversely to the Plaintiffs, he would seek an adjournment , presumably to afford time to buttress the evidence. I refused to accede to such a request. I did not think it proper to attempt to consider these sorts of issues of principle in a vacuum; that is, without reference to the actual evidence before me. I indicated that I was prepared to hear evidence and argument on the assessment , but if an application for an adjournment were to be made at the outset, I would consider it. No such application was made.

Of course, counsel for the Fifth Defendant renewed these submissions in argument on the assessment, and I deal with them below.

The Plaintiffs' evidence filed in support of their case on the assessment consisted of the affidavit of Carmen Salvatore Genovese ("Genovese") sworn July 26, 1996.

Genovese is a Canadian chartered accountant and Trustee in Bankruptcy presently employed by the Canadian firm of Deloitte & Touche . Since July 1991 he, together with others at his firm, have been assisting the liquidators of ICIC in the conduct of its liquidation. His affidavit evidence essentially put before the Court a statement of the hours which, in his opinion ,were fairly expended by him and three other present or former colleagues, in connection with the investigation of the conspiracies. The three other individuals were J.B. Sheedy ("Sheedy") , B.W. Phinney ("Phinney") and T. Steele ("Steele"). It is apparent that Genovese was heavily involved in the investigation of this matter and the preparation of the Plaintiffs' case through the period 1994 and 1995 . He was also charged with the responsibility of quantifying the damage claim.

The Genovese affidavit contains sections on the various heads of damage together with supporting exhibit material . One exhibit item consists of "Estimated Professional Fees to Investigate Fraudulent Conspiracies Found in Cause 389 of 1992." Certain amendments were made to this schedule by Genovese in supplementary viva voce evidence in chief before me . In summary, the schedule sets forth, in the case of Sheedy (for the years 1991 to 1995), Steele (for the years 1991 and 1992), Phinney (for the years 1992 to 1994) and Genovese (for the years 1994 and 1995), the value of their time expended in relation to investigations relative to the "Pharaon Recovery". Pharaon is the Third Defendant , and an individual central to the conspiracies. Another column in the schedule sets forth the "Estimated % of Pharaon time related to FIIL [Finance and Investment International Limited] conspiracies". This represents Genovese's estimate of what percentage of the Pharaon recovery investigative time expended by each accountant in each year could fairly be attributed to the matters in issue in this action.

In addition to the Genovese affidavit evidence, I was referred to a very extensive statement of Sheedy dated February 22, 1995 and a shorter statement of Phinney dated February 24, 1995. These were in fact witness statements provided under Order 38 r 2A. I was told that

these served as the evidence in chief of Sheedy and Phinney at trial before Schofield J. They set forth, in great detail, the extensive efforts that were made by these individual accountants in investigating the conspiracies. Section 5 of the Sheedy statement, "The Actions of the Liquidators on their Appointment," and section 7, "The Document Gathering Exercise," are particularly revealing . There can be no doubt whatsoever that these accountants were engaged in a huge and complex investigative process involving massive quantities of documentation. The ICIC investigation, of necessity, took place in several countries.

The Sheedy statement describes the process of document gathering in London and in the Cayman Islands. It is apparent from his account that, typically, as new documentation was discovered in the investigation , there often followed a process of re-evaluation and reconsideration of what had gone before. It is apparent that documentation relevant to the investigations in this action had often to be extracted from other sources connected with other aspects of the ICIC or BCCI investigation. Mr. Sheedy indicates in his statement that at the time he left the Deloitte's firm in January 1995 there were approximately 76,300 boxes and approximately 335 lever arch files of indexes. The nature of the

documentary and other investigations carried out by these accountants are too extensive to summarize adequately here. Numerous examples are provided in the Sheedy statement. For example in 1994 some 80 tonnes of documents (contained in 1,800 trunks) were removed from Abu Dhabi. It was necessary to review these for purposes of this and other ICIC - related investigations. One of Mr. Sheedy's conclusions in his statement at trial is that "the number of different sources available to me during my investigations and the vast amount of documents contained within those sources has made searching for documents a very time consuming process. Furthermore, the paucity of original documents has added to the burden of ensuring that the documents we found were authentic and meant that we were constantly searching for further documents to verify what we had already found. What did assist us was that for numerous documents we found many identical copies of the same document, sometimes in or from different locations (such as London, the Cayman Islands and Abu Dhabi)". Needless to say, the accountants' work also included extensive efforts to index the material so it could be retrieved for purposes of the investigation.

It is obvious that the investigations relating to the subject conspiracies in this action were as extensive and complex as those undertaken in other aspects of BCCI- related litigation.

I am advised by Plaintiffs' counsel that, notwithstanding this, at the trial before Schofield J. on liability issues, counsel for the Fifth Defendant cross - examined the accountants on the basis that they had not done a thorough enough investigation.

It is worth reproducing several paragraphs of the relevant portions of the Genovese affidavit relating to the liquidators' costs :

"Section 3- Liquidators' costs.

23. I refer again to the affidavits sworn herein by Mr. Sheedy and also, in particular, to his statement dated 22 February 1995, to the statement of Mr. Phinney dated 24 February 1995 and to the transcripts of their oral evidence at the trial of this action. In those affidavits and statements and in their oral evidence Mr. Sheedy and Mr. Phinney described in very considerable detail the extent of the investigation carried out into the conspiracy or conspiracies as referred to in the Judgment. It would lengthen this affidavit unnecessarily to repeat the evidence previously given by Mr. Sheedy and Mr. Phinney. It is clear, I submit, that a vast amount of work was undertaken as part of the investigation.

24. As Mr. Sheedy records in paragraph 45 of his statement, the number of different sources available to him during his investigations and the vast amount of documents contained within those sources made searching for documents a very time consuming process. As he also noted, the paucity of original documents added to the burden of ensuring that the documents found were authentic resulting in a constant search for further documents to verify those already found.

25. The detailed review and examination of documents as they became available during the investigation led to the equally time consuming exercise of reconstructing the events

relating to the subject of this action over a 15 year period. The task of tracing the funding of the FIIL shares and the AOC shares which Mr. Sheedy dealt with in sections 12 and 13 of his statement itself occupied Mr. Sheedy and others working with him for a very long period of time lasting many months. Piecing the story together was a slow, laborious and very time consuming process.

26. The investigation commenced in July 1991 and was, effectively, still continuing right up to the date of the commencement of the trial of this action. In his statement Mr. Sheedy identifies those who in addition to himself were principally involved in the investigation. He specifically mentions by name Mr. Steele, Mr. Phinney and myself. As Mr. Sheedy says in paragraph 13 of his statement there were, in addition, a number of junior members of staff who assisted him, both in the Cayman Islands and in London, over a three and a quarter year period.

27. The personnel who worked on the investigation came from Deloitte & Touche, Grand Cayman and Canada, and from Touche Ross ("TR") (now Deloitte & Touche) in England.

28. Records of the hours spent by Deloitte & Touche personnel and the costs attributable thereto are maintained by the accounting department at BCCI, Grand Cayman. The department's information is derived from time sheets prepared by the personnel who charge time to the BCCI engagement. The timesheets are compiled by the personnel, stating the activity that they worked on and the number of hours spent. The timesheets are then summarized and tabulated by the accounting department in Grand Cayman who prepare schedules of the hours worked and the costs attributable thereto. The total of the cost of any one individual is a simple calculation of the hours worked multiplied by that individual's charge-out rate. The charge out rates applied are those which have been approved by this Court in the liquidation proceedings. This applies also to the TR personnel.

29. Records of the hours spent by TR personnel and costs attributable thereto are derived

from TR internal fee reports known as "make-ups". Each TR staff member is required to fill out a TR timesheet which is passed on to their particular TR office. The timesheet sets out the time worked on each particular activity in the BCCI liquidation. For example, the time incurred on the Pharaon investigation is charged to the Pharaon charge code numbered 042. Each TR office then submits the figures it has received to the TR Head Office in Milton Keynes. The BCCI accounting staff receive a make-up for each BCCI activity, so that there will be a TR fee report relating solely to the Pharaon 042 charge code. The make-up lists the persons who worked under that activity, the hours they have charged to the activity code and the costs thereby incurred. Copies of these make-ups are retained at Citadel House, Fetter Lane, London.

30. Based on the records maintained by the personnel concerned the total fees charged in respect of work directly or indirectly related to the investigation in the period 1991 through to the commencement of the trial in 1995 was US$3,506,640. The Liquidators recognize that not all of the time expended and included in that sum may be expressly attributable to this head of damage but to produce any detailed breakdown of that figure would involve a review and analysis of the very substantial working files and records of the Liquidators. This would be both extremely time consuming and costly and should in the view of the Liquidators be avoided if at all possible.

31. In order to determine the amount of costs that is attributable to the Defendants under this head, I have set out a brief summary of the time incurred by Mr. Sheedy, Mr. Steele, Mr. Phinney and me with a general description as to the activities undertaken by the individuals at that time as set out in the schedule prepared by me (page 102). I have ascertained from the available records the tasks these individuals were performing with a view to forming a fair estimate of the proportion of their time spent on areas outside this head of loss. I have been careful to err on the side of caution in favour of the defendants in the estimates I have made."

Having set forth the essential portions of the Genovese evidence, I make some additional comments based on the viva voce evidence of Genovese before me. This was in response to some additional questioning in chief by Plaintiffs' counsel, cross - examination by counsel for the Fifth Defendant, and some questions I put to Genovese.

This claim is based only on the man-hours expended by the four specified accountants. There were numerous other investigative personnel involved. These people expended fewer man-hours, and these are not quantified as part of this claim. Neither do the Plaintiffs claim any of the accountants' disbursement items such as telephone, fax, photocopying or travel expense though these would have been considerable, and clearly would be encompassed within the head of damage with which I am dealing on this assessment .

As to the charge-out rates referred to in paragraph 28 of the Genovese evidence, I observe that there is no issue of reasonableness here. The Fifth Defendant concedes the propriety of these rates.

Paragraph 29 makes reference to the Pharaon charge code ("no.042"). In response to my questioning, Genovese indicated that in relation to BCCI matters, this was only one of "hundreds of such codes." Clearly, the costs of BCCI investigative work were subdivided to this extent for purposes of charge identification. Accordingly, it was possible to quantify with certainty the amount of time that individual accountants had spent on Pharaon - related matters. Having done this, the exercise conducted by Genovese was to apply a percentage to each figure thus obtained in order to segregate out Pharaon - related work that could not fairly be attributed to the claims in this particular action.

According to his viva voce evidence, Genovese discussed this process of apportionment with both Sheedy and Phinney, though not with Steele, prior to the assessment. Sheedy agreed with the percentages applied to him, subject to one reduction that has been made in respect of 1991 costs. Phinney agreed that the estimate of conspiracy-related work in respect of his hours was "reasonable and conservative".

Genovese testified before me that the sorts of Pharaon - related work that he meant to exclude would encompass things like the U.S or Pakistan litigation which also involved

Pharaon and the Pharaon entities, but which were not directly relevant to the issues in the present action.

In his affidavit , Genovese includes sections on the work of Sheedy, Steele , Phinney and himself, by way of explanation and summary. I do not reproduce these here. In his evidence before me he indicated both in chief and in cross - examination that his estimates of the Pharaon - related time attributable to the subject conspiracies was "fair and conservative".

I pause to observe that Genovese, the only witness who gave evidence before me, appeared honest, knowledgeable, and well- placed to give an overview of what these accountants did and the hours they were obliged to expend. I have no doubt that he has used his best efforts to present the most accurate and fair picture he can of the work that was done investigating these conspiracies, bearing in mind the obvious costs involved in this quantification exercise itself. I accept that, when in doubt, he has erred on the conservative side.

Plaintiffs' counsel submits that this head of damage has been adequately proven by the material filed by the Plaintiffs, and I agree.

THE FIFTH DEFENDANT'S OBJECTIONS TO THE PLAINTIFFS' QUANTIFICATION OF DAMAGES.

The Fifth Defendant took the position that the Plaintiffs' evidence amounted to nothing more than mere estimation or speculation. Counsel for the Fifth Defendant argued that the Plaintiffs ought not to recover any damages because they had not produced the appropriate witnesses and their working papers at this assessment. As he put it in his written submissions:

> "In this case the quantum of damages could have been proven by the production of the Touche Ross working papers and records and the calling of Messrs. Sheedy, Steele and Phinney for cross-examination".

I reject this submission. The plaintiffs' case on this assessment does not fail because there was no additional evidence from Sheedy, Steele, or Phinney or because the totality of the "working papers and records" were not put before the Court.

As I have indicated , this case in damages was sufficiently proved by the material that was filed.

Counsel with any experience at all in commercial litigation are familiar with the spectacles of court rooms filled with boxes of files, accounting records and working papers. And yet, in these cases the actual evidence relied upon by the Court tends almost invariably to be distilled versions, often taking the form of a few pages of accounts or spread sheets, buttressed by some explanatory evidence. In such cases, if the distilled or summary version is to be challenged, the onus is upon the defendant. If there is a challenge, that is invariably undertaken through the discovery process before trial. I reiterate that in relation to this assessment, the Fifth Defendant made no application for discovery.

Indeed , I doubt that if it was ever its intention to do so. The Fifth Defendant seems to have been under the misconception that it was the Plaintiffs' obligation to put before the Court absolutely every jot and tittle of evidence relating in any way to the damage issue. That is not the Plaintiffs' obligation. Their obligation is to prove the case in damages, and they have done so.

Counsel for the Fifth Defendant dismisses the Genovese evidence as "mere speculation". He argues that, as a result, I may not consider it at all, or , at best, award only nominal damages. He likens the situation in this case to that in Tate & Lyle Food and Distribution Ltd. v. Greater London Council [1982] 1WLR 149, the only authority cited by the Fifth Defendant. The headnote from that case reads, in part, as follows:

> " The defendant statutory authorities undertook to construct two new piers for the Woolwich Ferry and, as a result of that work, heavy deposits of silt formed in the River Thames thereby preventing access to the barge moorings for the plaintiff companies' premises near the river. Between 1967 and 1974, the plaintiffs incurred costs of dredging that part of the river and they set those costs against their liability to pay corporation tax.
>
> In the plaintiffs' action for negligence and nuisance, the defendants were held not to be liable for the siltation caused by the exercise of their statutory powers in constructing the piers but they were held liable for their

> failure to dredge away deposits of silt formed. The parties agreed the amount of damages to be awarded subject to (i) whether they should include an amount for managerial and supervisory expenses incurred by the plaintiffs in attending to the problems caused by the silt and (ii) the amount of interest payable on the damages."

In that case the plaintiffs attempted to recover part of their managerial and supervisory expenses (which they would already have had to pay in any case) directly attributable to the defendants' failure to dredge the silt , essentially as lost profit. The plaintiffs had kept no records at all of the time expended, and the best the plaintiffs could do by way of quantifying their loss was to estimate such expense as a percentage of the damages awarded.

That is not the situation here. In the BCCI - related investigations, the accountants have kept detailed time records. Accountants working on the Pharaon-related investigations recorded their time under charge code no. 042. This was only one of "hundreds" of such time codes in the BCCI - related investigations. The plaintiffs recognize, however , that to rely simply on the charge code 042 data would be misleading insofar as it also encompasses other litigation in addition to the present case. Accordingly, Genovese

undertook a process of apportionment of each accountant's time, year by year, to arrive at a figure that would fairly reflect the time spent on the subject investigations. There were ample time records available to the accountants to formulate the damage claim by this means. That is a completely different situation from that in the Tate & Lyle case, in which there were no records whatsoever.

Genovese indicated that the internal fee reports known as "make-ups" (referred to in paragraph 29 of his affidavit) did not actually indicate the task or activity undertaken by the accountant in each particular case. In order to try to ascertain this with precision it would have been necessary to go back to "working records" or "working papers". This was not always done. Counsel for the Fifth Defendant argues that because of this I may place no reliance upon Mr. Genovese's percentages of the time on charge code 042 attributable to these investigations.

Genovese made it clear in his evidence that to dig further into the accountants' records would have been an "impractical exercise". In fact, he did look at enough of them to

know what the other accountants had done. This was inevitable because he "needed to go through records all the time". He also worked with the other accountants on a regular basis and, although his involvement with them in connection with these conspiracies did not begin until 1994, it is clear that Genovese was intimately familiar with the work the accountants had done throughout these investigations. He gained that knowledge on the basis of his very extensive review of the documentation and his day-to-day contact with his colleagues. When asked by me to elaborate on the supporting documentation that might have been available to identify with more precision the tasks involved, he indicated he could have gone to working papers, files, spread sheets and possibly also the personal diaries of his colleagues. Significantly however, if he had done so, while he might have learned more about the topics covered in meetings for example, he would still inevitably have had to engage in some estimation exercise in order to determine the amount of time involved in each instance. I have no difficulty concluding that what Mr. Genovese did in order to calculate the time expended in connection with the investigation of these conspiracies, was quite reasonable in the circumstances.

I reject the Fifth Defendant's contentions that there is no evidence of damages before me , or that it is virtually impossible to quantify damages so that only nominal damages are available. As indicated, I am of the view that the Genovese affidavit is sufficient to support an award of damages in the amount sought. Even if there is a element of estimation, I would still make the award.

Where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J. put it in Chaplin v Hicks, [1911] 2 K.B.786 (C.A.), a leading case on the issue of certainty: "The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages." Indeed, if absolute certainty were required as to the precise amount of loss that the Plaintiffs had suffered, no damages would be recovered at all. Of course, as Devlin J. said in Biggin v Permanite [1951] 1K.B. 422 at 438: "Where precise evidence is obtainable, the court naturally expects to have it , [but] where it is not, the court must do the best it can." Generally, though the difficulty of proof does not normally dispense with the necessity of proof, the standard demanded can seldom be that of certainty.

Schofield, J. was guided by the principles set forth in British Motor Trade Association v Salvadori [1949] 1 Ch. 556 in respect of liability matters and as a result he awarded this head of damage. I rely on the same authority as guidance in the quantification exercise. In that case the plaintiff was a trade association which, in order to prove a case of procurement of breach of contract in connection with the inflationary resale of new vehicles, was forced to conduct an extensive and expensive investigative process. The court allowed recovery of these costs. It is to be noted that that case involved the tort of conspiracy, as does the case before me.

Roxburgh, J observed at 569-70:

> "To resist such a counter-attack and also counter-attacks from various other directions, the plaintiffs maintain, and must maintain, a large investigation department, and the money actually expended in unravelling and detecting the unlawful machinations of the defendants which have been proved in this case before any proceedings could be taken must have been considerable. I can see no reason for not treating the expenses so incurred which could not be recovered as part of the costs of the action as directly attributable to their tort or torts. That these expenses cannot be precisely quantified is true, but it is also immaterial. Accordingly, the plaintiffs have proved the damage which is essential to the tort of conspiracy, and they are entitled to an inquiry accordingly.

> As I had already indicated, not all the overt acts are exclusively referable to the conspiracy. Two of them are referable, yet at the same time they involve breach of covenant. Two transactions, though forming no part of the conspiracy, represent breaches of covenant. As no conspiracy to make and break contracts by impersonation or otherwise is alleged, damages for each breach of covenant must be assessed separately, and great care must be taken to ensure that in no case are damages awarded twice over in respect of the same transaction. Mr. Shelley, however, contended that this is not enough. He submits that there should be no inquiry at all as regards damages for breach of covenant, because, as he contends, only nominal damages are recoverable. I do not think so. I think that as regards each separate breach the master must estimate as best he can the pecuniary loss which the plaintiffs have suffered having regard to the circumstances in which it occurred and the difficulties which have confronted the plaintiffs in detecting and unravelling it before they were in a position to take proceedings, and I shall direct an inquiry accordingly." (emphasis added)

The Plaintiffs also relied upon the decision of the Supreme Court of Canada in Penvidic Contracting Co. Ltd v International Nickel Co. of Canada Ltd (1975), 53 DLR (3d) 748. That case involved a construction agreement to lay ballast and track for a railroad. The owner was in breach, in several respects, of its obligation to facilitate the work. The

contractor, who had agreed to do the work for a certain sum per ton of ballast, claimed by way of damages the difference between that sum and the larger sum that he would have demanded had he foreseen the adverse conditions caused by the owner's breach of contract. There was evidence that the larger sum would have been a reasonable estimate. In the Supreme Court of Canada it was held that where proof of the actual additional costs caused by the breach of contract was difficult, it was proper to award damages on the basis of the estimation used at trial. The difficulties of accurate assessment should not relieve a wrongdoer of the duty of paying damages for breach of contract.

In Penvidic the trial judge had pointed out in his reasons that "the evidence was not as helpful as one would have expected and more records giving more particulars of when and where different types of work were being done would have been very useful". Nevertheless, he properly accepted evidence of a witness that the estimation basis was reasonable.

I adopt , as did the Supreme Court of Canada in Penvidic, the view of Davies J. in Wood v Grand Valley R. Co. 51 S.C.R. 283, another decision of the Supreme Court of Canada:

> "It was clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs, but it seems to me to be clearly laid down there by the learned Judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or Judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if "the amount of the verdict is a matter of guess work." (emphasis added)

Spence J. in Penvidic (at 767) concluded that:

> "I can see no objection whatsoever to the learned trial Judge using the method suggested by the plaintiff of assessing the damages in the form of additional compensation per ton rather than attempting to reach it by ascertaining items of expense from records which, by the very nature of the contract, had to be fragmentary and probably mere estimations."

The Penvidic case is a useful source of references to the leading English authorities in the area of certainty of damages . I adopt the principles set forth therein.

As indicated, counsel for the Fifth Defendant relied upon one authority, the decision of Forbes J in Tate & Lyle, and in particular the following passage at page 152:

> "The problem, it seems to me, resolves itself into two constituents: (a) Is there any warrant for suggesting that managerial time, which otherwise might have been engaged on the trading activities of the company, had to be deployed on the initiation and supervision of remedial work (excluding anything which might properly be regarded as preparation for litigation)? And (b) if so, could this reasonably have been the subject of evidence, or is it so difficult to quantify that the application of some suitable rule of thumb is justified?"

What I am concerned with is whether a case in damages has been sufficiently proven. I have concluded that it has. Counsel for the Fifth Defendant argues that more records should "reasonably have been the subject of evidence" to quote from the passage in Tate & Lyle. I note the reference to "reasonableness" in deciding whether a plaintiff has put sufficient evidence before the court on an assessment. I adopt this statement from McGregor on Damages 14th ed at 190-1:

> "Generally, therefore, although it remains true to say that "difficulty of proof does not dispense with the necessity of proof," the standard demanded can seldom be that of certainty. Even if it is said that the damage must be proved with reasonable certainty, the word "reasonable" is really the

controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating its amount. The clearest statement of the position is that of Bowen L.J. in Ratcliffe v Evans where he said:

> "In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

In this case, I regard the exercise undertaken by Mr. Genovese in refining the Pharaon-related man hours by estimation to exclude time unrelated to these conspiracies, as perfectly "reasonable". It seems to me this is particularly so, and I must have particular regard to "reasonableness," in a massive undertaking like this where every dollar spent in gathering additional proof of loss would eat directly into the recovery proceeds in the

It was apparent from the cross - examination as well that there was a more specific suggestion that hours attributed to Steele in 1991 were expended on unrelated work, and that Sheedy had not expended any hours at all in 1991 in connection with these matters. I have reviewed the reasons of Schofield J, considered carefully the evidence of Genovese and the statements of the other accountants at trial. I am convinced that there is a sufficient connection (in view of the interrelatedness of the companies involved) to conclude that the hours attributed to them are appropriate for 1991. I note that at the outset of the assessment Genovese did make a point of reducing by half the hours attributable to Sheedy for 1991.

Perhaps the most startling attack made by counsel for the Fifth Defendant was to the effect that the bulk of the costs sought could not be recovered because they related to litigation preparation. It was never denied by Genovese that the bulk of the investigative costs sought to be recovered for the period 1992-1995 related to this litigation. Genovese admitted that the accountants' investigations had uncovered the conspiracy by 1992, and at the time of trial the "basis remained the same as in 1992". Counsel for the Fifth Defendant seemed to take the approach that such expense should be recovered as costs in

the litigation, and not as damages. Of course, if this were so, this head of damage in the judgment of Schofield J. would virtually be emasculated.

I reject this contention on the part of the Fifth Defendant. The relief granted by Schofield J. is expressed in wide enough terms to cover these costs. If it were not so, it is extremely difficult to comprehend what else Schofield J. could have had in mind. As Plaintiffs' counsel points out, these accountants were never tendered at trial as experts. Rather they were witnesses as to the facts. Accordingly their massive costs cannot be recovered as costs in the litigation. Counsel for the Fifth Defendant seemed to agree with my suggestion that his submission in this regard amounted to the contention that the Plaintiffs could have their investigative costs up to the point where they were in a position to plead their case, but not the costs incurred in putting themselves in a position to prove their case. That simply cannot be correct. In any case, there was considerable evidence that the accountants were finding new documents and information steadily through the period 1992 to 1995. Reference has already been made to 80 tonnes of documents dumped on these accountants in 1994. The continuing nature of the claim is apparent in the Sheedy evidence at trial and it is clear in the reasons of Schofield J.

Accordingly, I certify the Plaintiffs' damages, pursuant to Order 37, under this head as the total estimated Deloitte & Touche professional fees set forth in the schedule to the Genovese evidence, subject to the deduction that must be made in respect of the Sheedy hours for 1991 as corrected by Genovese in his viva voce evidence.

I award simple interest, at the Court's prevailing rate from time to time, on these damages. The interest will run, in each case, from the end of each calendar year in which the costs were actually incurred. These may be calculated on a cumulative basis in the manner set forth in the schedule attached to the draft order tendered on August 9, though it will of course have to be recalculated.

Costs to the plaintiffs.

Dated this 22nd day of October, 1996

GRAND COURT - CAYMAN ISLANDS

J. D. Murphy

Judge of the Grand Court